No. 14,831.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

ALLEN E. SUSMAN,
DONALD T. ROSENFELD,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellee.

LOEB AND LOEB,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES — PAGE

INTERNAL REVENUE BULLETIN

REGULATIONS

STATUTES

No. 14,831.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

1. The statutory provision believed to sustain the jurisdiction of the District Court is Title 28, United States Code, Section 1346(a).

2. The statutory provision believed to sustain the jurisdiction of the Court of Appeals is Title 28, United States Code, Section 1291.

Statement of the Case.

We accept appellant's statement of the case.

Summary of the Argument.

The trial court found that the airplane flights here in question did not involve the "transportation of persons" as that term is generally understood in accordance with

its ordinary meaning and common usage, and as it is used in Section 3469(a) of the Internal Revenue Code of 1939. Appellant appears to accept general understanding, ordinary meaning and common usage as proper tests to determine the meaning of the statutory language. In order to establish its version of "transportation," however, appellant resorts to usage of the term in connection with prior federal legislation in the Motor Carrier Act and Civil Aeronautics Act. By treating this case as if the question presented is whether these flights came within the scope of such acts, appellant in fact rejects the tests it purports to accept. Two highly technical legislative enactments clearly do not establish general understanding, ordinary meaning and common usage. Under well established rules of statutory construction it is also clear that the courts will not determine the meaning of words in one statute by reference to similar words in other separate, distinct and unrelated statutes.

In order to establish that Mantz and these flights were subject to the jurisdiction of the Civil Aeronautics Board, appellant in its brief seeks to introduce new evidence on appeal. The evidence itself is clearly irrelevant; and appellant's attempt to submit new evidence in this manner should not be allowed.

In the only decision to construe the meaning of "transportation" in Section 3469(a) it was held that payments for charter of fishing boats were excluded, thus giving the statute a construction in accordance with the every day sense of the term.

Congress amended Section 3469 in 1951 to specifically exempt payments for fishing boats, reversing an erroneous application of the tax by the Commissioner of In-

ternal Revenue. The circumstances surrounding the amendment establish that the proper construction of Section 3469 is to exclude from "transportation" transactions not commonly understood to be within its scope.

Apart from the instant proceedings, the Treasury Department actually agrees with the rule for construing Section 3469 which was adopted by the District Court. This is shown by the exemption of circus trains from tax in the Treasury Department's regulations although no express provision therefor is found in the statute.

When Section 3469 was enacted in 1941 Congress intended this excise tax to restrict the volume of the usual forms of transportation. "Transportation," as used in Section 3469, was never intended to cover the isolated or special type of flights involved herein.

These flights were not for the purpose of transportation. The Treasury Department's regulations also recognize that payments are subject to tax only when made for purposes of transportation.

The District Court made a reasonable construction of the statute and one which is consistent with established rules for statutory construction. Appellant has not advanced any relevant argument to show error in the District Court's opinion. Appellant's complaint in substance is that the District Court's interpretation of the meaning of "transportation" differs from its own, but in attempting to support its own interpretation, appellant's argument goes contrary to principles of long standing, rejects the principles it purports to accept, and is antagonistic to the Treasury Department's own regulations. We believe that appellant has failed to show any error by the District Court.

ARGUMENT.

I.

The District Court Correctly Held That the Payments For the Airplane Flights Involved in This Case Were Not Subject to the Tax on Transportation of Persons Under Section 3469(a) of the Internal Revenue Code of 1939.

A. Appellant's Attack on the Decision Below Is Based on Issues Irrelevant to This Proceeding.

Although this is a tax case, appellant has devoted substantially its entire brief to questions which might arise under the Civil Aeronautics Act of 1938, Chap. 601, 52 Stat. 973. Whether Mantz was a common carrier and whether the particular flights involved herein were subject to regulation by the Civil Aeronautics Board has no relevance whatsoever to this case. For purposes of argument, however, we can concede that Mantz was a common carrier and these flights were subject to regulation by the Board. From this it obviously does not follow that the flights were also subject to the transportation tax.

Appellant's position in essence is that if Mantz and these flights are covered by the Civil Aeronautics Act they are also covered by the tax on transportation of persons. This position violates all accepted rules of statutory construction. It is well established that separate acts on distinct subjects will not be read together.

> *Walling v. Portland Terminal Co.,* 330 U. S. 148, 150, 67 Sup. Ct. 639; 91 L. Ed. 809, 812 (1947);
>
> *Lane v. Railroad Retirement Board,* 185 F. 2d 819, 822 (6th Cir., 1950);

Northern Pac. Ry. Co. v. United States, 156 F. 2d 346 (7th Cir., 1946), aff'd 330 U. S. 248; 67 Sup. Ct. 747, 91 L. Ed. 876 (1947).

It has been specifically held that the meaning of "transportation" in the Interstate Commerce Act has "slight force, if any" in determining the meaning of the same term in the Natural Gas Act.

Federal Power Commission v. East Ohio Gas Co., 338 U. S. 464, 470, fn. 9, 70 Sup. Ct. 266, 94 L. Ed. 268, 276, fn. 9 (1950).

We contend, as the District Court held, that "transportation" as used in Section 3469(a) of the Internal Revenue Code of 1939 should be interpreted as that term is generally understood in accordance with its ordinary meaning and common usage. As the Supreme Court stated, ". . . the words of a statute—including revenue acts—should be interpreted in their ordinary every day senses." (*Crane v. United States,* 331 U. S. 1, 67 Sup. Ct. 1047, 91 L. Ed. 1301, 1306 (1946).) A more specific guide to the construction of Section 3469(a) is found in the cases arising under the tax on transportation on property, imposed by Section 3475, Internal Revenue Code of 1939, which have held that "transportation" as there used should be given its ordinary meaning as generally understood.

Getchell Mine, Inc. v. United States, 181 F. 2d 987 (9th Cir., 1950);

Edward H. Ellis & Sons v. United States, 187 F. 2d 698 (3rd Cir., 1951);

Kerns v. United States, 204 F. 2d 813 (4th Cir., 1953);

Castle Shannon Coal Corp. v. United States, 98 F. Supp. 163 (D. C. Pa., 1951).

Appellant has referred to these cases, upon which appellee relied below, but dismisses them as not relevant because they involve the transportation of property under Section 3475 and not of persons under Section 3469. [App. Br. pp. 14-15, fn. 2.] We do not contend that the ultimate findings in these cases are precedent on both facts and law for the case at bar. We do contend, however, that there is no basis for distinguishing the rule of statutory construction which these courts employed to reach their ultimate findings. Further, appellant's rejection of the authority of these cases under Section 3475 on the ground of differences between Section 3469 and Section 3475, which both impose excise taxes on transportation and were both originally enacted in the Revenue Act of 1941, is remarkable in view of appellant's own efforts to assimilate Section 3469 with decisions arising under the entirely separate, distinct, and unrelated Civil Aeronautics Act and Motor Vehicle Act.

We believe, therefore, that appellant cannot show the ordinary meaning of "transportation" in common usage by illustrating the use of that term in separated and unrelated prior acts. To accept appellant's suggestion would not only be contrary to all the authorities cited above, but would produce the somewhat startling result that the "ordinary every day senses" of words are to be garnered from highly technical prior legislation.

B. Appellant's Attempts to Introduce New Evidence on Appeal Should Not Be Condoned.

Appellant's argument is not only irrelevant, as we believe we have shown, but is based on evidence not in the record. The tariff schedules included in Appendix B of appellant's brief were not introduced in evidence before the District Court. They could be before this

court only on the theory of judicial notice. Yet this court has specifically held that it would not take judicial notice of similar tariff schedules.

> *El Dorado Terminal Co. v. General American Tank Car Corporation,* 104 F. 2d 903 (9th Cir., 1939), *rev'd on other grounds,* 328 U. S. 12, 66 Sup. Ct. 843, 90 L. Ed. 1053 (1940).

Accord:

> *Lichten v. Eastern Airlines, Inc.,* 8 F. R. D. 138 (D. C. N. Y. 1948).

The existence of such schedules was known at time of trial and copies were easily obtainable. We submit that it is improper for appellant to seek to introduce new evidence on appeal which, for lack of timely presentation, would not even have been ground for a new trial in the court below.

See:

> *United States v. Bronsen,* 142 F. 2d 232 (9th Cir., 1944);
>
> *Gibson v. International Freighting Corp.,* 173 F. 2d 591 (3rd Cir., 1949), *cert. den.* 338 U. S. 832, 70 Sup. Ct. 47, 94 L. Ed. 507 (1949).[1]

The same impropriety exists in appellant attempting to show, although irrelevant, that Mantz was a common carrier by referring to facts alleged in pending, but undecided, cases not before this court. [App. Br. p. 17, fn. 6.] Only in exceptional circumstances, not here present, will

---

[1]Further indication of the irrelevance and unreliability of appellant's Appendix B is that of the five different models of airplanes involved in the flights in question, two (L-I-E and B-25) are nowhere mentioned in Appellant's Appendix B. [R. 19-20.]

a court take notice of proceedings in other cases which are not in evidence.

Ellis v. Cates, 178 F. 2d 791, 793 (4th Cir., 1949), *cert. den.* 339 U. S. 964, 70 Sup. Ct. 998, 94 L. Ed. 1373 (1950);

A. G. Reeves Steel Const. Co. v. Weiss, 119 F. 2d 472, 474 (6th Cir., 1941), *cert. den.* 314 U. S. 677, 62 Sup. Ct. 181, 86 L. Ed. 541 (1941).

C. No Issue of Transportation From "Point to Point" Is Involved in This Proceeding.

Appellant states that appellee contended before the District Court that the movements in this case did not constitute transportation because our employees were picked up and discharged at the same point. [App. Br. p. 10.] This statement is not correct. The question of "point to point" transportation arises only under Section 3475(a), relating to transportation of property, which requires that the transportation be "from one point in the United States to another." We have never contended that the reason these flights were not taxable transportation of persons under Section 3469 was that they were exempt under Section 3475(a) which obviously has no application.[2] What we contend is that these flights did not constitute "transportation" within the meaning of Section 3469(a) because appellee's employees did not travel to go, or to go and come back from anywhere, that is, they had no destination as such. Appellant does

---

[2]The contention was omitted for the reason stated and not for lack of authority. "Transportation implies the taking up of persons or property at some point and putting them down at another." *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, 203 (1885).

admit that some forms of air travel are not "transportation" such as going aloft "merely to experience the sensation of flight." [App. Br. p. 12.] The use of the airplanes by appellee's employees is even further removed from the usual conception of air travel. The cameramen doing photography from the air needed an elevated moving base for their cameras. The discovery of suitable ground locations required observation from an elevation not possible except from an airplane. But, we submit, payments by appellee for flights for such purposes were not for "transportation" in its every day sense.

The regulations of the Commissioner of Internal Revenue, as approved by the Secretary of the Treasury, has recognized that the *purpose* of the payments in question is material.

Reg. 42, Section 130.53(i) provides:

> "(i) Chartered conveyances. An amount paid for charter of a special car, train, motor vehicle, aircraft or boat *for transportation purposes,* provided no charge is made by the charterer to the persons transported, is subject to tax if the amount paid represents a per capita charge of more than 35 cents for each person actually transported. (For information with respect to the exemption of amounts paid on or after November 1, 1951, for transportation, on or after that date, of persons on boats chartered for fishing purposes, see section 130.60a)." (Emphasis added.)

By expressly limiting taxability to payments for transportation purposes, this regulation exempts appellee's payments because they were not paid for transportation purposes.

II.

The Only Judicial Construction of the Meaning of Transportation in Section 3469 Supports Appellee's Position.

Only one court, so far as appellee is aware, has passed upon the meaning of "transportation of persons" in Section 3469. In *Smith v. United States,* 110 F. Supp. 892 (D. C. Fla., 1953), the court held that payments for use of a fishing boat were not subject to the tax on transportation of persons.[3] In this case the captain-owner of the boat carried parties out in the boat to fish and would furnish tackle, bait, and a helper to clean the catch. Charges were based upon a flat rate for a minimum number of hours, plus an additional charge per hour for each hour over the minimum, without regard to the number of persons aboard the boat. The court emphasized that the charges were not based upon the number of persons aboard and held the payments were not for "transportation" under the statute.

The *Smith* case supports appellee's position. There the operator of the boat carried his passengers into positions suitable for fishing; in the subject case each pilot carried his passengers into positions suitable for aerial photography or observation.

---

[3]The *Smith* case is actually the first of a series of fishing boat cases decided by the same court and judge. See *Harris v. United States,* 55-1 U. S. T. C. par. 49,111 (1955); *Gibson v. United States,* 55-1 U. S. T. C. par. 49,112 (1955); *Walls v. United States,* 55-1 U. S. T. C. par, 49,113 (1955); *Knowles v. United States,* 55-2 U. S. T. C. par. 49,148 (1955). In *Gibson v. United States,* 54-2 U. S. T. C. par. 49,055 (1954), the court states that one of the few areas the tax on fishing boats was applied was in the jurisdiction of that court.

Appellant states that the *Smith* decision was erroneously decided because there the court relied "solely" upon cases involving the tax on transportation of property under Section 3475. [App. Br. p. 14.] This statement is not correct. Included among the authorities cited by the court was *De Luxe Check Printers v. Kelm,* 99 F. Supp. 785 (D. C. Minn., 1951) which involved the federal excise tax on luggage under Section 1651. This is pointed out not to seize upon an inadvertence but to show appellant's complete misconception of the basis for the *Smith* decision. The supporting decisions were obviously not cited by the court for their factual similarity but as authority for its opinion that "transportation" in Section 3469 should not be given a technical meaning.[4]

Appellant also seeks support for its position from the 1951 amendment to Section 3469(a), which exempted from transportation the tax amounts paid by fishing boats. [App. Br. p. 13.] This amendment occurred approximately two years prior to the *Smith* decision. Appellant quotes the following statement in the report of the Senate Committee on Finance:

> "Under present law amounts paid for transportation in boats where the transportation takes place

---

[4]Appellant also states no appeal from *Smith* in 1953 was warranted because the 1951 amendment to Section 3469(a), hereafter discussed, made the question moot. [App. Br. p. 15, fn. 3.] This statement appears to be a departure from previous policy. See, *i. e.,* Rev. Rul. 55-58, Int. Rev. Bull. No. 5, p. 9, January 31, 1955 which expressly states that the Internal Revenue Service will continue to treat as ordinary income payments received after 1950 from certain patent assignments notwithstanding such payments might be capital gain under the Internal Revenue Code of 1954. Further, two years after the *Smith* decision the Commissioner still maintained payments for fishing boats were subject to tax. See cases cited fn. 3, *supra.*

> for the sole purpose of fishing from the boat have been *held* to be taxable under these sections. (Emphasis added.) [App. Br. p. 13.]

By whom was this "held"? So far as we are aware the only such holding was by the Commissioner of Internal Revenue. Appellant's untenable argument thus appears to be that if the Commissioner takes a position that is subsequently overruled by Congress, in some manner this proves the Commissioner to have been correct. It seems clear that appellant's statement that Congress approved the Commissioner's technical construction of "transportation" by considering payments for fishing boats properly subject to tax are completely unwarranted.

Appellant further argues that the *Smith* case was wrongly decided because the court failed to recognize Congressional intent in connection with the 1951 amendment. If the amendment made a *change* in the law as appellant contends, then the court, under the accepted rule of construction, should have held that what the amendment exempted from tax was taxable prior to the amendment. By exempting the payments made even before the amendment, however, the court clearly showed that it, as well as Congress, considered the amendment only declaratory of existing law by its disapproval of the Commissioner's position.

The final contention of appellant to be considered in connection with the 1951 fishing boat amendment is that this specific exemption by Congress excludes exemption of other forms of transportation not expressly enumerated. [App. Br. pp. 13-14.] We submit that this argument is fallacious for several reasons.

First, the premise of the argument is that the payments by appellee were taxable unless specifically exempted. But if these payments were not for "transportation," as the District Court held, then they did not fall within the scope of the statute in the first place. Appellant's argument thus assumes the point at issue in the proceedings below.

Second, if the *Smith* case was correctly decided, which we contend it was, the 1951 amendment made it mandatory for the Commissioner to follow the original Congressional intent. Since the statute was thus not applicable to at least one situation prior to the amendment, it is apparent that there could be and are other transactions to which it also does not apply.

Finally, it is significant that the Treasury Department's own regulations provide for an exemption which is not enumerated in the statute.

Treas. Reg. 42, Sec. 130.54 provides:

> "(f) Circus or show trains.—The amount paid pursuant to a contract for the movement of a circus or show train is not subject to tax where the amount covers only the transportation of the performers, laborers, animals, equipment, etc. by the circus or show train. However, if the contract payment also covers the issuance to advance agents, bill posters, etc., of circus or show scrip books, or other evidence of the right to transportation, for use on regular passenger trains, that portion of the contract payment properly allocable to such scrip books or other evidence is subject to the tax."

Since the statute contains no express provision for such an exemption, the regulation necessarily means that the Treasury Department construes the statute to permit

exemptions not expressly mentioned. Appellant's argument before this Court, and upon which it relied below, thus is antagonistic to its own published regulations.

We do not claim that we, or other taxpayers, are entitled as a matter of law to the same exemption as circus trains. We do contend, however, that this Treasury Regulation presents a rule for construction of Section 3469(a) by which appellant is bound until it is revoked and, further, that reenactment of the statute without any change of this rule of construction "bespeaks Congressional approval." *United States v. Anderson, Clayton & Co.* (U. S. Sup. Ct.) 24 L. W. 4001, 4005 (November 7, 1955).

III.

The District Court Correctly Construed Section 3469 in Accordance With Its Intent and Purpose.

The excise tax on transportation of persons was enacted in 1941 primarily for the purpose of curtailing excessive use of transportation facilities. Congress intended the tax to reduce the burden on transportation facilities which were used to convey through continual use large numbers of persons. Congress was not concerned about isolated payments for flights for such specialized reasons as those in the case at bar.[5]

The term "transportation" was thus used in its ordinary sense connoting movement for the purpose of traveling. We may assume, as appellant has done, that in addi-

---

[5]See debates in Congressional Record, Appendix A, herein. The Court may use informed discussion in Congress when any doubt exists. (*United States v. C.I.O.*, 335 U. S. 106, 113, 68 Sup. Ct. 1349, 92 L. Ed. 1849, 1856.)

tion to the particular flights in question Mantz also carried passengers for transportation purposes within the scope of Section 3469. [App. Br. p. 16.] But the fact that some or all of Mantz's other flights were subject to tax does not, of course, bear on the case at bar. We are here concerned only with flights for the purpose of taking motion pictures or aerial observation, and not for the purpose of transportation.

Our position herein will not open the door to avoidance of the transportation tax. It is not disputed by appellant that each flight in question was for the purpose described in the Findings of Fact by the District Court. [R. 11-22.] It would not be difficult for the Commissioner to determine whether all or part of any additional flights in the future were in substance for transportation rather than in accordance with the facts in the case at bar.

Conclusion.

In order not to repeat the summary which preceded this argument it will be enough to say, as we think has been shown, the judgment appealed from is in all respects correct and should be affirmed.

Respectfully submitted,

Allen E. Susman,
Donald T. Rosenfeld,
Attorneys for Appellee.

Loeb and Loeb,
Of Counsel.

APPENDIX A.

94 Congressional Record, 80th Congress, 2d Session (Senate).

Senator McCarren (Nevada) speaking on behalf of his amendment to repeal the excise tax on the transportation of persons declared that the tax was imposed in 1941 as a war measure for two reasons. The lesser reason he declared was for the collection of revenue but the tax was "largely imposed at a time when troops were being moved across the continent and elsewhere, and when we wanted as much space on rail and bus and air facilities as we possibly could obtain for the moving of our troops, and those in government compelled to travel. So we were anxious to curtail travel.

"At that time there was a general hue and cry about curtailing travel. Everyone was supposed to remain at home as much as possible and thus avoid congestion in vehicles of travel . . ." [pp. 3137-39].

---

95 Congressional Record, 81st Congress 1st Session (House).

McDonough (Calif.): "These taxes (levied on communications and on transportation) were imposed during the war to discourage the use of our overburdened communications and transportation facilities as well as to raise needed revenue for the prosecution of the war. . . .

"The present excise tax on the transportation of both property and persons operates as a sales tax upon an essential service that is not a luxury and has to be used repeatedly by large sections of the population. . . ." [Appendix, p. 9, A 3545.]

Short (Missouri): ". . . Most everyone realizes that during the war it was necessary for us to raise

additional revenue by so-called luxury taxes. . . . Of course it was necessary to have taxes on these articles not merely to raise revenue, but also to discourage the public's buying and use of these commodities and services during wartime. . . ." [Appendix, p. 9, A 4929.]

---

96 Congressional Record, 81st Congress 2nd Session (House).

Martin (Mass.) *re* wartime excise taxes: "May I say these taxes in the first instance were not proposed as revenue measures. They were to discourage travel on the railroads; they were to discourage people from talking too much on the telephone; they were to discourage people from going into industries where the demand for goods was not fully in accord with the war effort. That is the main reason these taxes were imposed . . ." [p. 994].

Elston (Ohio): ". . . it should be remembered that taxes on transportation and communication were not levied in the first instance to produce revenue. They were assessed solely to discourage wartime travel and to make all systems of communications more readily available for war purposes." [p. 1378.]

Young (Ohio): "They (excise taxes) were imposed upon transportation to bring in revenue and to discourage travel . . . It (the tax on transportation) was passed as a war measure to discourage unnecessary travel, to free the railway systems for the transportation of troops and supplies . . ." [pp. 1533, 1534].

Van Zandt (Penn.): "Taxes on transportation and communication were assessed solely to discourage wartime travel so that such systems would be readily available for war purposes rather than for the purpose of producing revenue." [Appendix, p. A 1475.]